Supreme Court, U.S.
FILED

981171 JAN 21 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

DARNELL GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK E. OVERLAND*
OVERLAND & GITS
Third Floor
1717 Fourth Street
Santa Monica, CA 90401
(310) 917-5577

MARK A. BORENSTEIN
MEMBER OF TUTTLE & TAYLOR,
A LAW CORPORATION
355 South Grand Avenue,
Fortieth Floor
Los Angeles, California 90071
(213) 683-0600

Attorneys for Petitioner Darnell Garcia

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7918
F.D.

QUESTION PRESENTED

Whether the District Court and the Court of Appeals erred in summarily refusing to grant a certificate of appealability under 28 U.S.C. § 2253(c)(1) of Petitioner's Motion pursuant to 28 U.S.C. § 2255 ("2255 Motion") on the ground that Petitioner had not made "a substantial showing of the denial of a constitutional right" within the meaning of 28 U.S.C. § 2253(c)(2), even though Petitioner's 2255 Motion alleged facts establishing that:

a. Petitioner was deprived of his right to the effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution and was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution by the prosecutors' actions which prevented the defense from presenting relevant and material defense witnesses. Petitioner's appellate counsel rendered ineffective assistance by failing to raise this issue on appeal.

b. Petitioner was deprived of his rights to due process of law under the Fifth Amendment to the United States Constitution and the right to a jury trial under the Sixth Amendment by the district court's adjournment of jury deliberations for eight days over the objection of his defense counsel.

c. Petitioner was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution and to effective assistance of counsel and the right to compulsory process in violation of the Sixth

QUESTION PRESENTED – Continued

Amendment to the United States Constitution by the prosecutors' refusal to grant immunity to a material witness, who was obligated to testify for the government under a plea agreement, thereby allowing the witness to testify concerning evidence relevant and material to the defense. Petitioner's appellate counsel rendered ineffective assistance by failing to raise this issue on appeal.

d. Petitioner was deprived of his right to the effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution and was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution by the prosecutors' actions which prevented the defense from presenting business records and testimony which were relevant and material to the defense. Petitioner's appellate counsel rendered ineffective assistance by failing to raise this issue on appeal.

e. Petitioner was deprived of his right to the effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution and was deprived of due process of law at his trial in violation of the Fifth Amendment to the United States Constitution by the prosecutors' actions which prevented the defense from obtaining Swiss

QUESTION PRESENTED – Continued

documents relevant and material to Petitioner's defense. Petitioner's appellate counsel was ineffective by failing to raise this issue on appeal.

f. Petitioner was deprived of due process of law at his trial in violation of the Fifth Amendment to the United States Constitution by the prosecutors' failure to disclose exculpatory evidence in their possession concerning psychiatric treatment of the government's main witness.

g. Petitioner was deprived of his rights to due process and equal protection under the Fifth Amendment to the United States Constitution and his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution by the district court's imposition of a sentence grossly disproportionate to equally culpable codefendants similarly situated, in part, because of race.

h. Petitioner was deprived of his rights to due process of law under the Fifth Amendment and his right to a jury trial under the Sixth Amendment to the United States Constitution by the district court's imposition of a more severe sentence on the ground that Petitioner exercised his constitutional right to a jury trial.

LIST OF PARTIES

Petitioner:	Darnell Garcia
Respondent:	United States of America
Other parties below:	None

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	8
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

Federal Cases

Frazer v. United States, 18 F.3d 778 (9th Cir. 1994) 7

Hohn v. United States, ___ U.S. ___, 141 L. Ed. 2d 242, 118 S. Ct. 1969 (1998), *reversing* 8 F.3d 1301 (8th Cir. 1993) 3

Sanders v. United States, 373 U.S. 1 (1963) 4, 5

Taylor v. Illinois, 484 U.S. 400 (1988) 6

United States v. Medina-Cervantes, 690 F.2d 715 (9th Cir. 1982) 6

United States v. Rodriguez-Rodriguez, 929 F.2d 747 (1st Cir. 1991) 5, 6

United States v. Stockwell, 472 F.2d 1186 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973) 6

United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) 5

Washington v. Texas, 388 U.S. 14 (1967) 5

Webb v. Texas, 409 U.S. 95 (1972) 6

Federal Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2253(c)(1) 2, 3

28 U.S.C. § 2253(c)(2) 2, 5

28 U.S.C. § 2255 ..... 2, 3, 4, 5, 6, 7

PETITION FOR A WRIT OF CERTIORARI

Darnell Garcia hereby petitions for a writ of certiorari and requests this Court to grant the petition, vacate the order of the court of appeals denying a certificate of appealability and remand the case to the Ninth Circuit Court of Appeals for reconsideration of the merits of petitioner's appeal.

OPINION BELOW

The order of the Court of Appeals denying petitioner's request for a certificate of appealability is unreported and is reproduced at App., *infra* 1.

JURISDICTION

The order of the Court of Appeals was filed on October 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the Fifth Amendment to the Constitution provides: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . " The relevant parts of the Sixth Amendment to the Constitution provide: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to have compulsory process

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provisions of 28 U.S.C. §§ 2253(c)(1), (2), and 2255 are reproduced at App., *infra* 61 and 62.

STATEMENT

1. On April 24, 1997, Petitioner filed a *pro se* § 2255 Motion to vacate, modify, or correct the sentence imposed by the district court on November 24, 1995[1] after remand by the Court of Appeals on October 4, 1994, following appeal from the judgment entered on August 20, 1991. Petitioner's § 2255 Motion requested the court to order the government to respond to the Motion, and also sought an evidentiary hearing. (App., *infra* 7) On November 17, 1997, following order of the district court, the government filed its memorandum and exhibits in opposition to Petitioner's § 2255 Motion. On July 24, 1998, by minute order, the district court denied Petitioner's § 2255 Motion without hearing. (App., *infra* 6) On August 31, 1998, Petitioner filed a Notice of Appeal from the order of the district court and an application for certificate of appealability. (App., *infra* 3) On September 8, 1998, the

[1] Petitioner was sentenced to a term of 49 years and a fine of $1,065,000 for conspiracy to use communication services to distribute drugs, theft of government property, possession of heroin with intent to distribute, and money laundering. Petitioner has satisfied the fine.

district court, by form order, denied a certificate of appealability. (App., *infra* 2)

2. On October 23, 1998, the Court of Appeals summarily denied a certificate of appealability. (App., *infra* 1)

REASONS FOR GRANTING THE PETITION

This case presents an important issue which is related to this Court's recent holding in *Hohn v. United States*, ___ U.S. ___, 141 L. Ed. 2d 242, 118 S. Ct. 1969 (1998), *reversing* 8 F.3d 1301 (8th Cir. 1993). *Hohn* provided for certiorari review by this Court of the denial of a certificate of appealability under 28 U.S.C. § 2253(c)(1), (2), following a district court's denial of a motion pursuant to 28 U.S.C. § 2255, but neither *Hohn*, nor any other court, has addressed the standard by which a district or appellate court must determine that a defendant has made a "substantial showing of the denial of a constitutional right" in order to issue a certificate of appealability.

The district court's denial of a certificate of appealability contains no findings of fact and consists solely of a box checked in a pre-printed form order, reciting the absence of the statutory prerequisite for the granting of a certificate of appealability. (App., *infra* 2) The order of the Court of Appeals is similarly uninformative. (App., *infra* 1)

Under such circumstances, and in light of the substantial allegations of deprivation of constitutional rights under the Fifth, Sixth, and Eighth Amendments to the

Constitution, made by Petitioner, there can be no guarantee of meaningful appellate review of the denial of Petitioner's § 2255 Motion.

1. Petitioner's § 2255 Motion alleged facts tending to establish that the government knew and withheld the true identity of a crucial defense witness from Petitioner's trial counsel; that the government dissuaded other defense witnesses from testifying by threat of indictment; that the district court, over defense objection, adjourned jury deliberations without legal cause after four days; that the government refused to grant immunity to a material defense witness who was obligated to testify for the government under a plea agreement; that the government arbitrarily refused to utilize both the United States/Italy Mutual Assistance Treaty in Criminal Matters and the United States/Switzerland Mutual Assistance Treaty to obtain defense evidence; that the government failed to disclose psychiatric evidence relevant to impeach the credibility of its principal witness; and, that the district court imposed a grossly disproportionate sentence on Petitioner on the basis of race and because of his exercise of the constitutional right to a jury trial.

2. This Court has previously established "basic rules to guide lower federal courts" in making determinations of issues arising under § 2255 motions. *See, Sanders v. United States*, 373 U.S. 1, 15-19 (1963) (establishing guidelines for treatment of successive applications under § 2255.) The failure to establish similar rules with respect to a district court's denial of a certificate of appealability, on the basis that "there has been no substantial showing of the denial of a constitutional right", would insulate

dismissals of § 2255 motions from any meaningful appellate review. For example, the right of a § 2255 movant to an evidentiary hearing is subject to a threshold requirement that dismissal without a hearing can only occur if specific conditions are satisfied. *United States v. Rodriguez-Rodriguez*, 929 F.2d 747, 749-750 (1st Cir. 1991). The unjustified denial of an evidentiary hearing by the district court could be effectively insulated from appellate review by rote recitation of the talismanic language of 28 U.S.C. § 2253(c)(2), and the appellate court can avoid the substantive issues underlying a dismissal of the § 2255 motion by refusing to issue a certificate of appealability. Similarly, the standards provided by this Court in *Sanders v. United States*, 373 U.S. 1, *supra*, could be circumvented by the denial of a certificate of appealability unless this Court establishes specific standards clarifying the statutory terms "substantial showing of the denial of a constitutional right."

3. The allegations in Petitioner's § 2255 Motion entitle him to an evidentiary hearing under established principles. For example, Petitioner has alleged facts implicating his Sixth Amendment right to compulsory process in order to obtain favorable witnesses. *Washington v. Texas*, 388 U.S. 14 (1967). The facts alleged by Petitioner satisfy the requirement that he make "a plausible showing that the testimony of the . . . witness would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982). Petitioner has alleged facts establishing that the prosecution utilized threats or intimidation which

dissuaded potential defense witnesses from testifying in violation of his right to due process. *Webb v. Texas*, 409 U.S. 95, 98 (1972). Petitioner has also alleged the refusal of prosecutors to utilize the provisions of the Italian and Swiss treaties in order to enable the defense to obtain favorable evidence. A hearing would establish if such refusals violated the Compulsory Process Clause of the Sixth Amendment and the principles established by this Court in *Taylor v. Illinois*, 484 U.S. 400 (1988). Finally, Petitioner has alleged facts establishing that he was subjected to more severe punishment simply because he exercised his right to stand trial. Such use of the sentencing power is a clear violation of an individual's constitutional right to trial. *United States v. Medina-Cervantes*, 690 F.2d 715 (9th Cir. 1982); *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973).

4. The decision in this case has significant ramifications. Meaningful appellate review of the district court's order denying Petitioner's § 2255 Motion would be based on an examination of established principles governing entitlement to an evidentiary hearing. In undertaking such review, the appellate court would consider that a § 2255 motion can only be dismissed without a hearing if (1) the allegations, taken as true, would not entitle the movant to relief, or, (2) the allegations in the motion cannot be true because they are contradicted by the record, are inherently incredible, or are conclusions rather than statements of fact. *United States v. Rodriguez-Rodriguez*, 929 F.2d 747, 749-750 (1st Cir. 1991). Additionally, the appellate court would consider whether the factual allegations in a § 2255 motion are based on facts

outside of the record, thus requiring an evidentiary hearing, unless credibility can be "conclusively decided on the basis of documentary testimony and evidence in the record." *Frazer v. United States*, 18 F.3d 778, 771 (9th Cir. 1994). The court of appeals would also consider whether sufficient allegations were made, in order that movant "be given an opportunity in the form of an evidentiary hearing to attempt to prove his allegations." *Frazer v. United States, supra*, 18 F.3d at 771. In this case, appellate scrutiny over the district court's order denying Petitioner's § 2255 Motion has been effectively averted by the district and appellate courts' conclusion that "there has been no substantial showing of the denial of a constitutional right." This Court should not countenance the creation of an elusive standard which may preclude appellate review of the bases for dismissal of a § 2255 motion, but should rather provide guidelines for determining the application of such a standard.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK E. OVERLAND*
OVERLAND & GITS
1717 4th Street, Suite 300
Santa Monica, California 90401
(310) 917-5577

MARK A. BORENSTEIN
Member of TUTTLE & TAYLOR,
a Law Corporation
355 South Grand Avenue –
40th Floor
Los Angeles, California 90071
(213) 683-0605
Attorneys for Petitioner

* *Counsel of Record*

January 21, 1999

APPENDIX LIST

Page

A. The Order of the Court of Appeals for the Ninth Circuit in *United States of America v. Darnell Garcia*, No. 98-56606, filed October 23, 1998 .....App. 1

B. The Order of the United States District Court for the Central District of California denying Respondent's Certificate of Appealability, filed September 8, 1998.....App. 2

C. The Application for Certificate of Appealability, dated August 28, 1998 .....App. 3

D. The Minute Order of the United States District Court for the Central District of California denying Defendant's motion for disclosure of Grand Jury transcripts and motion pursuant to 28 U.S.C. Section 2255, filed July 24, 1998.....App. 6

E. The Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By A Person in Federal Custody, dated April 14, 1997 .....App. 7

F. Declaration of Mark A. Borenstein In Support of Motion Under 28 U.S.C. § 2255, dated April 23, 1997.....App. 51

G. Declaration of Mark E. Overland, dated March 30, 1993.....App. 60

H. Text of 28 U.S.C. § 2253 – Appeal .....App. 61

I. Text of 28 U.S.C. § 2255 – Federal custody; remedies on motion attacking sentence.....App. 62

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DARNELL GARCIA, Defendant-Appellant.	No. 98-56606 DC# CV-97-2928-TJH CR-88-983-TJH Central California ORDER (Filed Oct. 23, 1998)

Before: KLEINFELD and HAWKINS, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED
CLERK, U.S. DISTRICT COURT
SEP - 8 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES OF AMERICA, Petitioner, vs. DARNELL GARCIA, Respondent.	)	CASE NO. CV 97-2928-TJH CR 88-983-TJH ORDER RE: CERTIFICATE OF APPEALABILITY

App. 2

On August 31, 1998 Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

☐ The Certificate of Appealability is GRANTED. The specific issue(s) satisfy §2253(c)(2) as follows:

☑ The Certificate of Appealability is DENIED for the following reason(s):

☑ There has been no substantial showing of the denial of a constitutional right.

☐ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

☐ The appeal seeks to test the validity of the detention pending removal proceedings.

DATED: September 8, 1998

Tony J. Taylor
UNITED STATES DISTRICT JUDGE

TUTTLE & TAYLOR
SEP 30 1998
CALENDARED

BEST AVAILABLE COPY

MARK E. OVERLAND (Bar No. 38375)
OVERLAND & GITS
1717 Fourth Street, Third Floor
Santa Monica, CA 90401
Telephone: (310) 917-5577
Facsimile: (310) 395-3884

MARK A. BORENSTEIN (Bar No. 084987)
TUTTLE & TAYLOR, A Law Corporation
Fortieth Floor, 355 South Grand Avenue
Los Angeles, CA 90071-3102
Telephone: (213) 683-0600
Facsimile: (213) 683-0225

Attorneys for Movant
Darnell Garcia

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DARNELL GARCIA, Defendant.	CASE NO. CV 97-2928-tjh APPLICATION FOR CERTIFICATE OF APPEALABILITY [28 U.S.C. §2253(c)(1)]

Defendant Darnell Garcia hereby applies to this Court for a Certificate of Appealability of this Court's Order, entered on July 24, 1998, summarily dismissing, without a hearing, Mr. Garcia's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255 (hereafter, "Motion").

Mr. Garcia, in his Motion and in his Traverse to the government's Answer, has made a "substantial showing of the denial of a constitutional right" and is therefore entitled to a certificate of appealability pursuant to 28 U.S.C. §2253(c)(2).

In his Motion and in his Traverse, Mr. Garcia made a "substantial showing" that his conviction was obtained in violation of his due process rights by the government's failure to disclose exculpatory evidence and by its intimidation of witnesses who would have presented evidence favorable to the defense. Additionally, Mr. Garcia has made a "substantial showing" that the fact-finding process was distorted by the district court's refusal to order the government to consent to the testimony of a witness whose plea agreement with the government compelled her to testify on behalf of the government, and whose testimony was favorable to the defense in determining the credibility of three witnesses who had testified for the government pursuant to a grant of immunity, thereby violating Mr. Garcia's right to Due Process of law. Mr. Garcia has also made a "substantial showing" that the district court's unplanned and unjustified suspension of jury deliberations violated his right to due process of law. Finally, Mr. Garcia has made a "substantial showing" that he was subjected to more severe punishment than his equally culpable co-defendants because he exercised his Fifth Amendment right to stand trial, and that his sentence was thereby so grossly disproportionate to the severity of the crime for which he was convicted as to constitute "cruel and unusual punishment" in violation of the Eighth Amendment.

Accordingly, Mr. Garcia respectfully requests that this Court issue a certificate of appealability pursuant to 28 U.S.C. §2253(c) and Rule 22 of the Federal Rules of Appellate Procedure as to all issues presented in his Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. §2255.

DATED: August 28, 1998

TUTTLE & TAYLOR,
A Law Corporation
MARK A. BORENSTEIN

By/s/ _____
MARK A. BORENSTEIN,
Attorney for Movant
Darnell Garcia

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs DARNELL GARCIA, Defendant.	CASE NO. CV 97-2928-TJH (CR 88-983-TJH) MINUTE ORDER OF JUDGE HATTER (Filed Jul. 24, 1998)

THE COURT having fully considered the defendant's motion for disclosure of Grand Jury transcripts and his motion pursuant to 28 U.S.C. Section 2255, the responses by the government and the defendant's reply,

IT IS ORDERED that both motions are DENIED.

cc: Counsel of Record

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court

District
CENTRAL DISTRICT OF CALIFORNIA

Name of Movant
DARNELL GARCIA

Prisoner No.
729817 (92910-012)

Case No.
CR 88-983(C)-TJH

Place of Confinement
McNeil Island C.C., P. O. Box 881000, Steilacom, Washington 98388-1000

CV 97-2928 TJH

UNITED STATES OF AMERICA

V.

DARNELL GARCIA
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack United States District Court, Central District of California

2. Date of judgment of conviction July 22, 1991, August 20, 1991, November 24, 1995

3. Length of sentence 49 years; $1,065,000 fine

4. Nature of offense involved (all counts) Count 1 – conspiracy to use communication service to distribute drugs; Count 2 – theft of government property; Count 3 – possession with intent to distribute heroin; Counts 4 & 5 – money laundering.

5. What was your plea? (Check one)
   (a) Not guilty [X]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

   (a) Jury [X]
   (b) Judge only [ ]

7. Did you testify at the trial?

   Yes [X] No [ ]

8. Did you appeal from the judgment of conviction?

   Yes [X] No [ ]

9. If you did appeal, answer the following:

   (a) Name of court U.S. Court of Appeals for the Ninth Circuit

   (b) Result Affirmed in part; sentence vacated

   (c) Date of result October 4, 1994

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

    Yes [ ] No [X]

11. If your answer to 10 was "yes," give the following information:

    (a)(1) Name of court _____

    (2) Nature of proceeding _____
    _____

    (3) Grounds raised _____
    _____
    _____
    _____
    _____

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes [ ] No [ ]

    (5) Result _____

    (6) Date of result _____

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court _____

    (2) Nature of proceeding _____
    _____

    (3) Grounds raised _____
    _____
    _____
    _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes [ ] No [ ]

(5) Result _____

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes [ ] No [X]

(2) Second petition, etc. Yes [ ] No [X]

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

12. State concisely every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence gained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by violation of the protection against double jeapordy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: See Attachment.

Supporting FACTS (state *briefly* without citing cases or law): See attachment.

B. Ground two: See attachment.

Supporting FACTS (state *briefly* without citing cases or law): See attachment.

C. Ground three: See attachment.

Supporting FACTS (state *briefly* without citing cases or law): See attachment.

D. Ground four: See attachment.

Supporting FACTS (state *briefly* without citing cases or law): See attachment.

Note: Other grounds are also on attachment.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: All of these claims resulted either from (1) information obtained after the appeal; or (2) involved facts outside the record on appeal.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attached herein:

(a) At preliminary hearing

(b) At arraignment and plea Mary F. Gibbons, 5141 Colfax Ave., North Hollywood, CA 91601

(c) At trial Mark A. Borenstein, 355 S. Grand Ave., 40th Fl., Los Angeles, CA 90071, and Mark E. Overland, 1717 4th St., Santa Monica, CA 90401

(d) At sentencing Mark A. Borenstein and Mark E. Overland

(e) On appeal Gail Ivens (appointed), 25 East Union, Pasadena, CA 91103

(f) In any post-conviction proceeding Mark A. Borenstein and Mark E. Overland (motion under Rule 35 of the Fed. Rules of Criminal Procedure).

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes [X] No [ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [ ] No [X]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [ ] No [ ]

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

/s/ Darnell Garcia
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

14 April 97
(date)

/s/ Darnell Garcia
Signature of Movant
Darnell Garcia

I.

ILLEGALITY OF MY CONFINEMENT

I am illegally confined as a result of the judgment of this Court for the following reasons:

Ground 1. I was deprived of my right to the effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution and was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution by the prosecutors' actions designed to prevent the defense from presenting Al Sevier, a.k.a. Al D. Towner, Ron Waddy and Conway Waddy as relevant and material defense witnesses. My appellate counsel rendered ineffective assistance by failing to raise this issue on appeal.

Ground 2. I was deprived of my rights to due process of law under the Fifth Amendment to the United States Constitution and the right to a jury trial under the Sixth Amendment by the district court's adjournment of jury deliberations for eight days over the objection of my defense counsel.

Ground 3. I was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution and to effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution by the prosecutors' refusal to request the trial court to grant immunity to Barbara Jackson, who would have presented evidence relevant and material to the

defense. My appellate counsel rendered ineffective assistance by failing to raise this issue on appeal.

Ground 4. I was deprived of my right to the effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution and was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution by the prosecutors' actions which prevented the defense from presenting business records relating to gold transactions in Italy, and the testimony of Augusto Ticonni and Barbara Winders, which were relevant and material to the defense. My appellate counsel rendered ineffective assistance by failing to raise this issue on appeal.

Ground 5. I was deprived of my right to the effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution and was deprived of due process of law at his Trial in violation of the Fifth Amendment to the United States Constitution by the prosecutors' actions which prevented my defense from obtaining documents in Switzerland relevant and material to my defense. My appellate counsel was ineffective by failing to raise this issue on appeal.

Ground 6. I was deprived of due process of law at my trial in violation of the Fifth Amendment to the United States Constitution by the prosecutors' failure to disclose exculpatory evidence in their possession concerning psychiatric treatment of John Jackson.

Ground 7. I was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution as a result of grand jury bias which was not discovered by me until 1996.

Ground 8. I was deprived of my rights to due process and equal protection under the Fifth Amendment to the United States Constitution and my right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution in that the district court imposed a sentence grossly disproportionate to equally culpable codefendants similarly situated, at least in part, based on race.

Ground 9. I was deprived of my rights to due process of law under the Fifth Amendment and my right to a jury trial under the Sixth Amendment to the United States Constitution by the district court's imposition of a more severe sentence on the ground that I exercised my constitutional right to a jury trial.

II.

STATEMENT OF FACTS SUPPORTING EACH GROUND

Ground 1. The Government's Actions Preventing the Defense from Presenting Al Sevier, a.k.a. Al Towner, Ron Waddy, and Conway Waddy as Witnesses.

A. Al D. Towner

One major part of the prosecutors' case against me involved the allegation that I arranged for the sale of a

very large quantity of stolen cocaine to a person identified at trial as "Al Sevier." Prosecution witnesses (and my co-defendants) John Jackson and Wayne Countryman, both former Drug Enforcement Administration ("DEA") agents, testified that they observed me with Mr. Sevier and saw me arranging one or more a drug sales to him. In addition, a woman who identified herself as Al Sevier's girlfriend testified in the prosecutors' rebuttal case that while she never met me, she heard my voice during several telephone calls to Mr. Sevier's house.

My counsel requested information from the prosecutors about Mr. Sevier, including his criminal history and telephone records. The prosecutors referred to this witness always as "Al Sevier." Indeed, at one meeting between my attorneys and the two prosecutors, just prior to the time the trial started in November 1990, one of the prosecutors told defense counsel that he thought Mr. Sevier was dead and that, in any event, they had no idea where he was or who he was.

At trial, I testified that I have never talked to Mr. Sevier, met Mr. Sevier, or had any dealings with him.

My defense counsel collected telephone records relating to Mr. Sevier's home phone to establish the real connection, not between me and Al Sevier, but between Mr. Sevier and prosecution witness Jackson. Indeed, my defense counsel determined that there was considerable telephone activity between John Jackson's telephone and John Jackson's mistress, on the one hand, and the Sevier home. The mistress, it turned out, was the mother of Al Sevier's girlfriend (with whom Sevier apparently had a child).

My counsel were only able to locate information about a telephone number listed to an individual named "Al Sevier." They had an investigator stake out the address assigned to the telephone, but Mr. Sevier was never found there. Unknown to either me or my counsel and not discovered until long after my trial was over, the prosecutors knew that Mr. Sevier's real name was Al D. Towner. The prosecutors never disclosed Mr. Sevier's real name and thereby prevented my defense from developing any additional evidence to rebut Jackson's testimony establishing a connection between me and Al Sevier.

The suggestion by the prosecutors that Al Sevier was dead was totally false. During the time the prosecutors were telling my counsel that they had no idea who Mr. Sevier was or what he had done, they in fact were actively investigating him. In March 1991, shortly before my trial concluded, the prosecutors obtained from the Grand Jury a multi-count indictment against "Al D. Towner", a.k.a. Al Sevier. A copy is attached as Exhibit A to the Declaration of Mark A. Borenstein ("Borenstein Decl."), which is filed with this motion. It was immediately sealed by Magistrate Judge Reichman, but the prosecutors persisted in their failure to provide information to me and my lawyers about Mr. Sevier. I am informed and believe that these actions by the prosecutors prevented my defense counsel from obtaining records relevant and material to my defense in that these records would have established a link between Sevier and prosecution witness Jackson rather than a link between Sevier and me. Additionally, based on the prosecutors'

misrepresentations about Mr. Sevier/Towner's true identity, the defense was unable to locate, interview and present him as a witness.

Mr. Sevier/Towner was arrested on October 1, 1993, and promptly entered into a plea agreement with AUSA Stefan Stein, who prosecuted the charges against me. Even then, while my conviction was pending appeal, Mr. Stein made no disclosure about the arrest of Mr. Sevier/Towner, nor did he advise the defense about the extremely generous plea agreement he arranged with Mr. Sevier/Towner. Mr. Sevier/Towner pleaded guilty to one count for conspiracy (without identifying which overt act was true) and received a six-year sentence. Mr. Stein characterized the plea agreement and sentence as "lenient." *See* Borenstein Decl., para. 5.

When Mr. Sevier/Towner was arrested, he was asked if he knew me and was asked to point me out from a photo lineup. Mr. Sevier/Towner told the officers that he did not know me, had never met me, had not talked to me, and had arranged no drug deals with me. *See* Borenstein Decl., para. 7. None of that information was ever disclosed to the defense in my case.

I am informed that Mr. Sevier/Towner is currently in a halfway house in Los Angeles. He will be released from federal custody in October 1997 after serving two-thirds of his 6-year sentence. If subpoenaed, I believe Mr. Sevier/Towner will testify honestly and truthfully in a manner that is consistent with what he told agents shortly after he was arrested, namely, he does not know me, never talked to me, never bought drugs from me and could not identify me. This significant evidence would

have contradicted the testimony of government witnesses Jackson and Countryman. Because of the prosecutors' failure to disclose important information about Mr. Sevier/Towner, including his real name, I was deprived of my right to obtain witnesses in my defense. In any event, Mr. Sevier/Towner's testimony is newly discovered evidence which I could not have ascertained before or during my trial and which was not possible to obtain because of the prosecutors' misconduct. *See* Borenstein Decl., para. 5.

B. Ron Waddy and Conway Waddy

The first count in the Amended Third Superseding Indictment for conspiracy to utilize communication devices to sell and distribute controlled substances was the core of the prosecutors' case against me. It was premised essentially on three groups of allegations. One involved John Jackson and Mahlon Steward, another witness who entered into a cooperation agreement with the prosecutors and received thousands of dollars from the prosecutors to testify against me. Mr. Steward admitted to many crimes with John Jackson, and he was not prosecuted for the main allegation against me that he sent money, which represented the proceeds from his sale of cocaine and heroin in New York, to me and John Jackson via Federal Express envelopes.

The second group of core allegations involved Al Sevier (Al D. Towner) and the alleged sale of perhaps as much as 180 kilograms of cocaine (the witnesses, John Jackson and Wayne Countryman, contradicted each other concerning the amount of drugs allegedly stolen and the

amount that was sold by me to Mr. Sevier). A third group of core allegations involved Ron Waddy and Conway Waddy, two Michigan brothers who were convicted of drug offenses and who were in federal prison during my trial. In fact, they were alleged to be unindicted co-conspirators in my case. I acknowledged at my trial that I knew the Waddys since I was a young boy in central city Los Angeles. Both Jackson and Countryman testified that I bought and sold cocaine from and to them, and that I also hid the Waddy brothers and assisted them in avoiding arrest on drug charges in June 1987.

I very much wanted to have the Waddy brothers testify on my behalf. After both agreed to interviews, one of my lawyers, Mark Overland, flew to the federal prison in Tennessee. Quite unexpectedly, when Mr. Overland arrived at the prison to interview Ronald Waddy in October 1990, Mr. Waddy refused to see him. After waiting at the prison hoping that Mr. Waddy would change his mind, Mr. Overland left the prison and returned to California without talking to Mr. Waddy. Both Ronald and Conway Waddy refused to talk with me or my lawyers about the charges against me until their recent release from prison and reemployment in the community.

I learned after my trial that the Waddys, after initially agreeing to talk with me and my lawyers, refused to do so after a visit while in prison from one of the prosecutors, Joyce Karlin, and two DEA agents. According to Ron Waddy, Ms. Karlin explained the evidence she said she had against me and then strongly suggested that it would not be wise for Mr. Waddy to show up at my trial. She said that if Mr. Waddy did testify, the government may indict him. Because Mr. Waddy was in federal custody, he

feared retribution in the event that he, in fact, talked with me or my counsel. Conway Waddy told the same story. He too was visited by Ms. Karlin. Mr. Waddy was told that if he testified at the Garcia trial, he would be indicted. As a result Conway Waddy would not cooperate with me or my attorneys. *See* Borenstein Decl., para. 8.

I also did not know at the time of my trial that Ms. Karlin, before becoming an Assistant United States Attorney, had been employed by the law firm that represented Conway Waddy in Los Angeles. Indeed, I have learned since my trial that Conway Waddy, in particular, had a personal and professional relationship with Joyce Karlin which was never disclosed by Ms. Karlin to me, my lawyers, or the court.

The great reluctance of the Waddy brothers to testify in my behalf provided a critical missing element in my defense. While I testified that I did not buy or sell any drugs with the Waddys and that I was not connected with any effort to assist them in avoiding arrest in June 1987, the prosecution witnesses Jackson and Countryman testified otherwise.

If Ms. Karlin had not dissuaded Ron and Conway Waddy from testifying, they would have testified that, while they knew me and regarded me at various times as a friend, I was not involved in any sales or purchases of drugs from them or to them. They would also say that I had nothing to do with drugs. This evidence was not reasonably available to me prior to or during my trial because of the prosecutors' misconduct in dissuading the Waddys from testifying as defense witnesses. Had they so

testified, there is a reasonable probability that the result in my case would have been different.

Ground 2. The District Court's Adjournment of Jury Deliberations Over the Objection of the Defense:

The testimony in my trial lasted 61 days between November 21, 1990 and April 3, 1991. Although trial was not convened on every business day, it was long and detailed, and undoubtedly provided an enormous amount of information for the jurors to digest. When jury deliberations started, the jurors asked a number of questions and appeared to deliberate diligently for the first 4 days until the presiding judge announced that he needed to go to Hawaii and that the jurors would be excused for 8 days while he was out of Los Angeles. A post trial interview with one of the jurors revealed that deliberations were quite heated and contentious. In fact, two of the jurors had a fight over the personal circumstances of one of the jurors, as they related to my case, and almost came to blows.

Prior to the Judge going to Hawaii, the Clerk of the Court, Florence Kato, called one of my lawyers, Mark Overland, to advise Mr. Overland of the Court's decision to suspend deliberations while the Judge was away. Mr. Overland objected to the Court's decision to suspend juror deliberations, and asked the Clerk to convey to the Court that the defense objected to the jury's deliberations being suspended for such a period of time. Later that day, Ms. Kato called Mr. Overland to report that she had conveyed to the Judge his objections, but that the Judge

nevertheless had released the jury for 8 days. Shortly after the jury returned on April 16, 1991, at approximately 10:15 a.m., it returned a verdict against me on the five remaining counts in the indictment. Filed herewith is a declaration from Mr. Overland which reflects his objection to the adjournment.

Ground 3. The Failure to Request Immunity for Barbara Jackson

Barbara Jackson was John Jackson's wife and a co-defendant at the time of my trial. However, she was not accused of any of the alleged drug transactions which the indictment charged against John Jackson, Wayne Countryman and me. Eventually Barbara Jackson pleaded guilty to a single count of tax evasion and received a fine, but was not required to serve any jail time or to be housed at a community facility.

During the trial, my lawyers possessed a tape recorded conversation with Barbara Jackson and other information that in her conversations with John Jackson, he had been told by the prosecutors that they were out to "get Darnell Garcia", that John Jackson stated that I was not involved in the drug deals and that it had been made clear to him that the whole object of the investigation was to get "Garcia." Barbara Jackson would have so testified, but for the then pending charges against her. This testimony was critical to my defense since it would have corroborated one defense theme that the prosecutors and the DEA had vindictively and impermissibly proceeded against me as a result of my successful race discrimination lawsuit against the DEA, which concluded about a

year before the indictment was issued. In fact, some of the remedial measures required as a result of my suit had still not been implemented by the time of the indictment. Moreover, her testimony would have contradicted the testimony of John Jackson at trial concerning the absence of any inappropriate government motivation in the prosecution, and that I was not the object of the investigation. A copy of the transcript of Barbara Jackson's recorded conversation is attached to the Borenstein Decl. as Ex. B.

Barbara Jackson was subpoenaed by my lawyers, but refused to testify because the criminal charges against her were still pending. On the advice of her lawyer, she indicated she would be willing to testify if she received some sort of immunity, but without that she could not do so. The prosecutors refused to request the Court to grant her immunity, and her testimony was never heard.

My appellate counsel, Gail Ivens, failed to raise this issue on appeal. I had spoken to her about raising this issue, but she declined to do so.

It is reasonably probable that if the prosecutors had requested immunity for Barbara Jackson, she would have testified favorably to the defense, and the result of the trial would have been different.

Ground 4. The Actions of the Prosecutors Precluding the Testimony of Barbara Winders and Italian Gold Documents Favorable to the Defense.

A. The Winders and Ticonni Testimony.

I admitted at trial that I was employed by a jewelry importer named "Oro Aurora," which was owned in the mid-1980s by Pierro Saltarelli and Augusto Ticonni. The principal bookkeeper of Oro Aurora was Barbara Winders. My lawyers issued subpoenas for both Winders and Ticonni because they would have testified about Oro Aurora's scheme to import huge quantities of gold jewelry from Italy without paying the very large customs duty which was then applicable to fabricated imported gold. I assisted in that scheme and earned a large amount of money from Oro Aurora's gold smuggling operation.

The gold smuggling operation alone produced millions of dollars in unreported income for Oro Aurora and its owners. But much of the gold that was smuggled, while marked as 14 karat, was actually only 10 karat gold. The underkarating of the smuggled gold meant that in addition to pocketing the 6-10% saved as a result of not paying customs taxes, Oro Aurora earned another 30% because 10 karat gold was much less expensive that the higher quality 14 karat gold. I testified at trial that I shared in the profits from this gold jewelry underkarating scheme. Ticonni and Winders were aware of the scheme and would have corroborated my testimony.

However, shortly after they learned of the Grand Jury's investigation of me in early 1988, both Ticonni and Winders fled the United States for Italy. Indeed, at the

same time that the Grand Jury was subpoenaing witnesses concerning me, Oro Aurora closed its doors at the Jewelry Mart in Los Angeles, and, according to one of Oro Aurora's owners, Mr. Saltarelli, all of its records were destroyed leaving no trace of the underkarating or jewelry smuggling scheme.

My lawyers were unable to subpoena in the United States either Winders or Ticonni, but when they learned that both were in Italy, they requested that the prosecutors invoke the United States/Italy Mutual Assistance in Criminal Matters Treaty to compel the testimony of both witnesses either in Italy or in the United States. Under Article 159 of the Treaty, the prosecutors could have requested assistance from the authorities in Italy to require persons in Italy to submit to a deposition there or to be transported to the United States for testimony here. The prosecutors refused to invoke the provisions of the Italian Mutual Assistance Treaty. Since a private party cannot avail himself directly of the Treaty, the prosecutors prevented me from presenting these two witnesses who would have supported one of my defenses.

If the testimony of Winders and Ticonni had been presented it is reasonably probable that the result of my trial would have been different.

Within the last two months, I have learned that Ms. Winders has purchased a home in Corona del Mar and Mr. Ticonni has taken up residence again in Beverly Hills. They are now within the subpoena power of the Court and could be compelled to testify at a hearing on this Motion.

B. Other Information Sought in Italy

I testified at trial that I hand-carried hundreds of kilograms of underkarated gold from Italy to the United States for Oro Aurora. Because Mr. Saltarelli, the owner of Oro Aurora, testified he destroyed all of Oro Aurora's records when he learned that I was under investigation by the Grand Jury, there were no records of the gold jewelry that I brought to the United States available from Oro Aurora. Since much of the gold was imported without paying customs taxes, there also were no customs records from the customs agent that Oro Aurora used for the gold (although customs records showed I did, in fact, bring in hundreds of kilos of gold jewelry and Oro Aurora paid import taxes on these legally imported jewelry pieces. An example of such a record is attached to the Borenstein Decl. as Ex. C.)

In every instance, when I left Italy with gold, I completed (sometimes with Mr. Saltarelli and sometimes alone) at the Rome or Milan airport, an Italian customs form that fully declared all of the gold that I was carrying. Those records, maintained by the Italian government and by the freight exporter which Oro Aurora used to transport the gold from companies in Arrezzo, Italy, named SIMAT, were never obtained by the prosecutors. The failure of the prosecutors to obtain this evidence which would have supported my defense, was one of the issues considered by the Ninth Circuit in my appeal. The Court of Appeals in its published decision acknowledged that the prosecutors had failed to collect this information which would have been exculpatory, but under *Miller v.*

Vasquez, 868 F.2d 1116 (9th Cir. 1990), held that the prosecutors and the investigating agents were under no obligation to collect this evidence. *United States v. Garcia*, 37 F.3d 1359, 1366 (9th Cir. 1994).

Apart from any obligation of the prosecutors to collect the Italian government and SIMAT export records, my lawyers and I affirmatively sought production of those records under the Italian Treaty with the United States. Like their attempts concerning Ticonni and Winders, my lawyers requested that the prosecutors seek, pursuant to the Treaty, disclosure of these export records (as well as records maintained by the companies which sold gold jewelry to Oro Aurora and which I believe would have demonstrated substantial sales of 10 karat gold), but the prosecutors refused. Their refusal to request the Italian authorities to obtain these records prevented me from obtaining them. One of my lawyers attempted to collect these records on his own in Italy. He travelled to Italy and went to SIMAT's offices outside of Arrezzo and to the three jewelry manufacturers which I knew supplied underkarated gold to Oro Aurora. Not surprisingly, SIMAT and the gold manufacturers were completely uncooperative and would not voluntarily disclose any records. The government's failure to utilize the Treaty denied my right to collect and present evidence in my defense.

I know that the SIMAT records and the Italian government records, at least (and very likely the jewelry manufacturer records) were available in 1991 and are likely still available today. When DEA agents went to Italy in 1988 and 1989 they visited the same places that my lawyer visited when he went to Italy in 1990. The

federal agents apparently were assisted by Italian police and, as a result, received considerably more assistance than my lawyer did. But most importantly, SIMAT and the Italian manufacturers showed the federal agents samples of the very documents that I needed in order to prove my defense.

The Italian jewelry manufacturer also showed the federal agent a handful of sales documents which purported to reflect the sale of 14 karat gold jewelry to Oro Aurora. These sales documents corresponded to cashier's checks that Oro Aurora sent to these companies. These checks were deposited into unidentified Swiss bank accounts. The checks and the deposits in Swiss banks reflected rebates that resulted from Oro Aurora's payment of invoices indicating 14 karat gold when, in fact, the gold sold to Oro Aurora was only 10 karat gold. Again, the prosecutors' refusal to invoke the Italian/United States Treaty, prevented me from obtaining the documentary information which would have corroborated my defense.

In addition, the prosecutors sought a voluntary deposition, outside the Italian Treaty, from Mr. Saltarelli in Rome. They gave him immunity for the smuggling crimes in exchange for his testimony. My lawyers wanted Mr. Saltarelli to bring documents relating to the gold smuggling and to Mr. Saltarelli's Swiss bank accounts. These documents would have been available under the Italian Treaty, but Mr. Saltarelli refused to be deposed under the Treaty. The prosecutors refused to request documents and Mr. Saltarelli refused to produce any. The trial court refused to intervene. No documents were produced by Mr. Saltarelli. He testified documents in the United States

were destroyed, but did not testify about documents in Italy. These documents would have corroborated my defense.

If such evidence had been presented it is reasonably probable that the result of the trial would have been different.

Ground 5. Failure to Obtain Swiss Documents

Relatedly, my lawyers prior to trial requested that the prosecutors obtain information from Swiss banks under the United States/Switzerland Mutual Assistance Treaty. A copy of the Swiss Treaty is attached to the Borenstein Decl. as Ex. D. That Treaty was similar to the Italian Treaty and provided, if requested, assistance from Swiss authorities in collecting documents that were important to criminal proceedings in the United States. The Treaty is not expressly limited to prosecution evidence. It could have been used to assist me in collecting defense evidence. My lawyers and I wanted to trace the funds from the Italian jewelry manufacturers to the Swiss banks. I testified that the money from the Italian manufacturers went into the bank accounts of Augusto Ticonni and Pierro Saltarelli, two accounts which I knew existed because I deposited money for them into those accounts at the Swiss Bank Corporation offices in Chiasso and Mendricio, Switzerland. I so testified at trial. However, because I was unable to obtain the records under the United States/Switzerland Treaty, my lawyers could not offer any corroborating evidence to my testimony, such as a bank statement or statements from Swiss bank officials, that these accounts indeed were owned by Ticonni and

Saltarelli. A copy of a sample account statement is attached to the Borenstein Decl. as Ex. E.

My lawyers made extraordinary efforts after the prosecutors refused to utilize the Treaty to try to get the information on their own. One of my lawyers went to Switzerland and met with the banker who was responsible for my bank account in Switzerland and for the accounts of Ticonni and Saltarelli. The banker refused to confirm or deny any information concerning Saltarelli and Ticonni although he agreed to take a letter addressed to Saltarelli from my counsel and give it to Saltarelli if he retrieved his mail, an implicit recognition that Saltarelli in fact had an account, or at least a banking relationship with the banker. That banker, Eugenio Michelli, refused my counsel's request to come to the United States to testify and refused his request to submit to a deposition under oath in Italy or Switzerland.

I believe the Swiss bank records are still available and the United States/Switzerland Treaty remains available to compel Mr. Michelli's testimony and the production of the bank records.

Ground 6. Failure to Disclose Exculpatory Evidence of Psychiatric Treatment of John Jackson.

Shortly after being accused of stealing a kilo of heroin from the DEA property section in Los Angeles, John Jackson was placed on administrative leave for a period of one year. I believe before Jackson's leave of absence from the DEA, the agency conducted a psychiatric examination which would have disclosed Jackson's propensity

to lie. The government possessed records of this examination prior to my trial. That information was never disclosed to me or my counsel.

Had such information been provided it is reasonably probable that a different outcome of the trial would have resulted.

Ground 7. Grand Jury Bias

Before the indictment against me was returned by the October 1988 Grand Jury, I filed a motion with Judge Hatter, challenging the propriety of the grand jury proceedings, in part because the Grand Jury was considering evidence that was wrongly obtained from the Swiss Government. A copy of the motion is attached to the Borenstein Decl. as Ex. F. Those arguments were eventually rejected, but as a result of those proceedings and other information I obtained from Grand Jury witnesses, I learned that the Grand Jury appeared to be closely divided on whether it should return an indictment against me. Nonetheless, an indictment was returned and was subsequently superseded several times. I do not know the vote taken by the Grand Jury, nor do I know how many Grand Jurors were present at the time the vote was taken.

However, last year I learned that one of the Grand Jurors, Roberta Rasp, whom I believe voted to indict me, was herself under investigation by the U.S. Attorney's office for fraud related to her services as a Grand Juror. She ultimately was indicted and convicted for conspiracy to commit mail fraud as a result of her Grand Jury service

during the time she was considering the evidence against me. A copy of the indictment against Roberta Rasp is attached to the Borenstein Decl. as Ex. G. Grand Jury proceedings are secret. I do not know whether she was an influential juror in connection with the return of an indictment against me. However, I do know, according to the indictment returned against her, during the time she was supposed to be impartial in the consideration of the evidence against me, she was concealing from the prosecutors an extensive fraud to obtain compensation as a result of her Grand Jury service. Because she was concealing her fraud, she quite likely acted in a way that would have either ingratiated herself with the prosecutors or caused the prosecutors not to suspect any wrongdoing on her part.

The subsequent indictment and conviction of a Grand Juror on the panel that returned an indictment against me requires, at a minimum, granting the accompanying motion to unseal Grand Jury records to determine the role that the juror played in jury deliberations and the vote on the indictment against me.

Ground 8. The District Court Imposed a Sentence Grossly Disproportionate to Equally Culpable Codefendants Similarly Situated.

Following the trial, the Court sentenced me to the maximum penalty possible, 80 years and a $1,165,000 fine. The Court also imposed a parole term under 18 U.S.C. § 4205(b) which would have made me ineligible for parole until I served a full one-third of my sentence. On appeal, the Court of Appeals reduced the sentence on

count one from 15 years to 4 years, reversed the Section 4205(b) designation by the district court and directed it to sentence me under Section 4205(a) instead. Following extensive proceedings under Rule 35 of the Federal Rules of Criminal Procedure, Judge Hatter reduced my sentence from the 69 years ordered by the Court of Appeals, to 49 years, with parole eligibility under Section 4205(a), as directed by the appellate court.

My sentence, however, was and is grossly disproportionate to the sentences my co-defendants received. Indeed, in sentencing them, the Court departed from the prosecutors' plea agreement with Jackson and Countryman, and sentenced both defendants to more lenient sentences than provided in their plea agreements.

For example, for the same conspiracy as charged against me and for drug sales of which I was not convicted, John Jackson, who had agreed to 15 years imprisonment, received a sentence of 10 years, no fine, and a special assessment of $150.00. Wayne Countryman, who was charged with the same conspiracy, and had agreed to a sentence of 7 years imprisonment, received a sentence of 5 years and no fine. Both sentences were pursuant to Section 4205(a), without the necessity of appellate intervention. The other defendant, Sherman Lair, who admitted to personally selling a large amount of cocaine and had agreed to a prison sentence of 1 year and a day, received a 2-year probationary sentence with 90 days in a treatment center, and no fine. Mahlon Steward, another of my alleged coconspirators, received no punishment at all for his participation in the crimes charged and, indeed, received substantial monetary compensation from the prosecutors for his testimony.

Remarkably, even though during my trial Mr. Sevier/Towner was repeatedly referred to as a drug kingpin and as a massive supplier of cocaine in Los Angeles, Mr. Stein, my prosecutor, agreed to a plea agreement whereby Mr. Sevier/Towner pleaded guilty to a single count of conspiracy and he received a sentence of 6 years, also under Section 4205(a). All these sentences were imposed after my trial was completed and while my appeal was pending, and were significantly less than my ultimate 49-year sentence.

These disparities in sentencing are so gross as to deprive me of due process and equal protection and to constitute cruel and unusual punishment. My conduct simply did not warrant so much additional prison time over that of my co-defendants, especially Jackson, who admitted that he planned and orchestrated the events underlying the charges, and even attempted a sale of drugs from prison while awaiting trial, in order to raise bail money.

I also believe race may have played a role here. All of the co-defendants were Black and all received substantially less punishment for their admitted crimes. I am of mixed race and my discrimination complaint against the DEA concerned my hispanic national origin.

Ground 9. Enhanced Sentencing as a Result of My Exercise of my Right to a Jury Trial

My trial lasted approximately 4 months and the Court at times seemed irritated with the length and duration of the trial. In one encounter during discovery motions, I recall the Court commenting to one of my

lawyers, Mr. Overland, that I could save everyone a lot of time and trouble by just pleading guilty. At the sentencing of John Jackson, Judge Hatter praised John Jackson for reaching a plea agreement with the prosecutors, and although he explicitly denied that he would punish anyone for going to trial, Judge Hatter stated that I was being punished for his perceived "perjury" in my testimony. Taking Judge Hatter's comments at John Jackson's sentencing at face value, inasmuch as the original plea agreement with Jackson was for 15 years and he was sentenced to 10, he imposed far more additional punishment on me than the 5-year maximum sentence for the "perceived" perjury.

Because eventually Judge Hatter would be a witness in any proceeding to determine whether he imposed extra punishment on me on the ground that I exercised my right to go to trial, I have filed concurrently with this Motion another Motion to disqualify Judge Hatter from any consideration of this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

Ground 1. I was deprived of my right to the effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution and was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution by the government's actions designed to prevent the defense from presenting Al

Sevier, a.k.a. Al D. Towner, Ron Waddy, and Conway Waddy as relevant and material defense witnesses.

The Sixth Amendment to the United States Constitution provides that a defendant has the right to compulsory process in order to obtain favorable witnesses. *Washington v. Texas*, 388 U.S. 14 (1967) In order to demonstrate a deprivation of this right,

> . . . a criminal defendant must show: (1) he was deprived of the opportunity to present evidence in his favor; (2) the excluded testimony would have been material and favorable to his defense; and (3) the deprivation was arbitrary or disproportionate to any legitimate evidentiary of procedural purposes.

United States v. Cruz-Jimenez, 977 F.2d 95, 100 (3rd Cir. 1992)

Put in other terms, a defendant can demonstrate a denial of the right to compulsory process if he makes "a plausible showing that the testimony of the . . . witness would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982)

A. Ron Waddy and Conway Waddy

Prosecution threats or intimidation which dissuade a potential defense witness from testifying may violate due process. *Webb v. Texas*, 409 U.S. 95, 98 (1972). The conduct of the prosecutors may "involve threats of prosecution or other intimidating conduct that was designed to intimidate." *United States v. Pinto*, 850 F.2d 927 (2d Cir. 1988).

Indeed, a defendant's compulsory process rights may be violated even if the governmental action is done under the guise of advising the defense witness of his constitutional rights. *United States v. Morrison*, 535 F.2d 223, 226-227 (3rd Cir. 1976).

In this case, Ms. Karlin threatened both Waddys, who were then in prison, and advised them not to become involved in my trial. Their testimony would have been relevant and material to my defense, but due to Ms. Karlin's misconduct, I was denied my Sixth Amendment right to compulsory process.

B. Al Sevier, a.k.a. Al D. Towner

Government misconduct resulted in my counsel not being able to locate this witness and present evidence negating my relationship with him as described by the government witnesses.

Ground 2. I was deprived of my rights to due process of law under the Fifth Amendment to the United States Constitution and the right to a jury trial under the Sixth Amendment by the district court's adjournment of jury deliberations for eight days over the objection of my defense counsel. *See, e.g., People v. Santamaria*, 229 Cal. App. 3d 269, 280 Cal. Rptr. 43 (1991) (trial court's decision to recess jury deliberations for eleven days violated the right of the accused to due process). *See also Hamilton v. Vasquez*, 17 F.3d 1149, 1159 (9th Cir. 1994) (recognizing authority of *Santamaria* but distinguishing *Santamaria* on its facts). My trial was long and detailed and provided an enormous amount of information for the jurors to digest. When the presiding judge announced, after the first four

days of deliberations, that he needed to go to Hawaii and that the jurors would be excused for eight days while he was out of Los Angeles, one of my attorneys objected to the Court's decision to suspend juror deliberations. The Judge nevertheless released the jury for eight days. This adjournment prejudiced my trial in that the jurors had a lengthy opportunity to discuss the case with outsiders at this critical point in the proceedings, their recollections of the evidence, the arguments, and the court's instructions likely became dulled or confused, and in other ways that additional discovery would likely disclose.

Grounds 3, 4 and 5. My right to due process of law in violation of the Fifth Amendment to the United States Constitution and to effective assistance of counsel and the right to compulsory process in violation of the Sixth Amendment to the United States Constitution by the government's refusal to request the trial court to grant immunity to Barbara Jackson.

I was denied my right to the effective assistance of counsel, my right to compulsory process in violation of the Sixth Amendment, and due process of law in violation of the Fifth Amendment, by the government's actions which prevented the defense from presenting business records relating to gold transactions in Italy, and the testimony of Augusto Ticonni and Barbara Winders, which were relevant and material to the defense. I was also denied my right to the effective assistance of counsel, my right to compulsory process in violation of the Sixth Amendment, and due process of law, by the government's actions which prevented the defense from obtaining Swiss documents relevant and material to the defense.

The prosecutors distorted the fact-finding process by its failure to grant immunity to Barbara Jackson. All of the main government witnesses against me, Mahlon Steward, John Jackson, Wayne Countryman, and Sherman Lair, were granted immunity or favorable plea bargains in exchange for their testimony. According to the prosecution theory, Barbara Jackson was the least culpable of all charged defendants. Indeed, the prosecutors entered into a plea agreement with Barbara Jackson allowing her to plead guilty to one count and receive 3-years probation. The Court ultimately imposed a 2-year probationary sentence with no time in custody.

My situation is equivalent to that analyzed by the Court of Appeals in *United States v. Young*, 86 F.3d 944 (9th Cir. 1996). In *Young*, the defendants were charged with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. The government presented 13 witnesses, including two codefendants, Drake and Mariani, and two other witnesses who testified for the government pursuant to plea bargains, and two witnesses who received immunity for their testimony. One of the defendants wanted to call a witness named Delfs who had heard Drake state that he was "falsely accusing somebody as being [his] supplier." *Id.*, at 947. Delfs invoked his Fifth Amendment rights and the defense moved for a grant of immunity in order to present his testimony. The Court of Appeals noted:

> In light of these plea agreements and grants of immunity, there is a serious danger that the government's denial of immunity to Delfs – the only witness who could have impeached Drake

> as the government's critical witness – distorted the fact-finding process. (*Id.*, at 948)

Likewise, in my case, the failure to grant immunity to Barbara Jackson distorted the fact-finding process. Barbara Jackson would have contradicted her husband's testimony by evidence that he stated to her that I was not involved in the drug deals and that it had been made clear to him that the whole object of the investigation was to get "Garcia."

Additionally, my appellate counsel was ineffective in failing to raise this issue on appeal. Appellate counsel's performance is measured by the standard of *Strickland v. Washington*, 467 U.S. 1267 (1984). *United States v. Birtle*, 792 F.2d 846, 847 (9th Cir. 1986). In this case, the failure to raise this issue on appeal fell below an objective standard of reasonable performance by counsel, and there is a "reasonable probability" that the appeal would have been successful but for counsel's failure.

Similar reasoning applies to the prosecutors' refusal to utilize the provisions of the Italian and Swiss treaties in order to enable the defense to obtain favorable evidence. The United States Supreme Court in *Taylor v. Illinois*, 484 U.S. 400 (1988), clarified that although the Compulsory Process Clause of the Sixth Amendment, by its terms, grants only the right to compel witnesses to appear through use of subpoena power, the Clause has consistently been interpreted to guarantee the right to present the testimony of witnesses. "The right to offer testimony is thus grounded in the Sixth Amendment, even though it is not expressly described in so many words. *Id.*, at 407-408.

In *United States v. Valenzuela Bernal*, 458 U.S. 858 (1982), the Supreme Court held that a defendant can demonstrate a denial of the right to due process and compulsory process, with respect to the deportation of a witness before a trial, if he makes "a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of the available witnesses." *Id*, at 873. If there is a "reasonable likelihood that the testimony could have affected the judgment of the trier of fact", sanctions are warranted for the deportation of an alien witness. *Id.*, at 873-874.

In this case, the arbitrary decision of the prosecution to refuse to utilize the provisions of the Swiss and Italian treaties to enable the defense to obtain favorable evidence precluded the presentation of non-cumulative material evidence, favorable to the defense. Moreover, there is a "reasonable likelihood" that such testimony "could have affected the judgment of the trier of fact." *Id.*

Ground 7. I was deprived of due process of law in violation of the Fifth Amendment to the United States Constitution as a result of grand jury bias which was not discovered by me until 1996.

In *United States v. Mechanik*, 475 U.S. 66 (1986), the Supreme Court held that "any error in the grand jury proceeding connected with the charging decision [is deemed] harmless beyond a reasonable doubt" where a petit jury subsequently convicts a defendant of the charges upon which he was indicted. *Id.*, at 70. There is an exception to this rule. Dismissal of an indictment is appropriate, even if the issue is raised after trial and

conviction, where "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair." *Guam v. Muna*, 999 F.2d 397, 399 (9th Cir. 1993) (*quoting Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988).)

Mechanik involved a violation of Fed. R. Crim Proc. 6(d) based on the simultaneous presence of two government agents in the grand jury room. The Supreme Court merely held that automatic reversal of the defendant's conviction was not required "regardless of the lack of prejudice." *United States v. Mechanik, supra*, 475 U.S. at 71-72.

I am not requesting reversal of my conviction in the absence of prejudice, but am requesting by the accompanying Motion concerning the production of grand jury records, that I be allowed to establish that I suffered prejudice as a result of the participation of the juror Roberta Rasp in the grand jury that returned the indictment against me. If I am precluded from the opportunity to present evidence of prejudice, I will be prevented from establishing that my grand jury did not make an "independent determination of probable cause that a crime has been committed." *United States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983).

Grounds 8 and 9. My sentence is so grossly disproportionate to the severity of the crime for which I was convicted as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. It may also deny me equal protection under the Fifth Amendment in part because my sentence was based on my hispanic hertiage and the other co-

defendants were all Black. "To pass muster under the Eighth Amendment, 'a criminal sentence must be proportionate to the crime for which the defendant has been convicted.' " *United States v. Cupa-Guillen*, 34 F.3d 860, 864 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 921 (1995); *Solem v. Helm*, 463 U.S. 277, 290 (1982). A criminal sentence that is "so grossly out of proportion to the severity of the crime as to shock [one's] sense of justice" violates the Eighth Amendment's prohibition of cruel and unusual punishment. *Cupa-Guillen*, 34 F.3d at 864 (citing *United States v. Vega-Mejia*, 611 F.2d 751, 753 (9th Cir. 1979)). *See also United States v. Bland*, 961 F.2d 123, 129 (9th Cir.), *cert. denied*, 506 U.S. 858 (1992) (the Eighth Amendment forbids "extreme sentences that are 'grossly disproportionate' to the crime"). In evaluating whether a sentence violates the Eighth Amendment, courts may consider the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. at 292.

The relatively lenient sentences received by my co-defendants and alleged co-conspirators illustrates that the severity of the crime for which I was convicted does not justify a 49-year sentence. For the same conspiracy as charged against me and for drug sales of which I was not convicted, John Jackson received a sentence of 10 years, no fine, and a special assessment of $150.00; Wayne Countryman received a sentence of 5 years and no fine; Sherman Lair, who admitted to personally selling a large amount of cocaine, received a 2-year probationary sentence with 90 days in a treatment center, and no fine.

Mahlon Steward received no punishment at all for his participation in the crimes charged; instead, he received monetary compensation from the prosecutors for his testimony. Al Towner, who, during my trial, was repeatedly referred to as a drug kingpin and as a massive supplier of cocaine in Los Angeles, received a sentence of 6 years. All these sentences, which were imposed after my trial was completed, were significantly less than my 49-year sentence. My conduct simply did not warrant so much additional prison time over that of my co-defendants, especially John Jackson, who admitted that he planned and orchestrated the events underlying the charges, and even attempted a sale of drugs from prison while awaiting trial, in order to raise bail money.

I received a more severe sentence than my co-defendants and co-conspirators because I exercised my constitutional right to stand trial. "An accused may not be subjected to more severe punishment simply because he exercised his right to stand trial." *United States v. Medina-Cervantes*, 690 F.2d 715 (9th Cir. 1982). Such use of the sentencing power is a clear violation of an individual's constitutional right to trial. *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973). *See also United States v. Capriola*, 537 F.2d 319, 320 (9th Cir. 1976) (per curiam); *Medina-Cervantes, supra*, 690 F.2d at 716 ("the courts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice").

During discovery motions in my case, Judge Hatter told one of my lawyers that I could save everyone a lot of time and trouble by just pleading guilty. At the sentencing of John Jackson, Judge Hatter praised John Jackson

for reaching a plea-agreement with the prosecutors, and stated that I was being punished for his perceived "perjury" in my testimony. Taking Judge Hatter's comments at John Jackson's sentencing at face value, inasmuch as the original plea agreement with Jackson was for 15 years and he was sentenced to 10, Judge Hatter imposed far more additional punishment on me than the 5-year maximum sentence for the "perceived" perjury.

Judge Hatter's statements, considered in conjunction with the significant disparity between my treatment and the treatment of my co-defendants who pleaded guilty, at a minimum, invite the inference that I was punished for exercising my constitutional right to stand trial. *Accord, Stockwell, supra,* 472 F.2d at 1187-88; *Capriola, supra,* 537 F.2d at 320-21; *Medina-Cervantes,* 690 F.2d at 716-17. Accordingly, my 49-year sentence must be vacated or remanded to allow the trial judge to either reduce my sentence or explain the disparity. *Id.; see also United States v. Citro,* 842 F.2d 1149, 1153-54 (9th Cir.), *cert. denied,* 488 U.S. 866 (1988) ("where such a disparity in sentences suggests that a defendant who pled not guilty was being penalized for exercising his constitutional right to a trial, reasons for the disparity must appear in the record. Where the record is devoid of reasons to support the disparity, a remand is necessary to permit the trial judge to either ameliorate the sentences or explain the disparity"); *United States v. Bischel,* 61 F.3d 1429, 1437 (9th Cir. 1995) ("an explanation . . . is required when there is a substantial disparity in sentences imposed upon different individuals for engaging in the same criminal conduct").

CONCLUSION

For all of the foregoing reasons, I respectfully request that the prosecutors be required to respond to this motion, that an evidentiary hearing be held, and that a new trial be granted. In the alternative, I request that a new reduced sentence be imposed.

Dated: April 23, 1997.

Respectfully submitted,

_____

Darnell Garcia

Darnell Garcia
No. 729817
MICC-C110
P.O. Box 8811000
Steilacoom, WA 98388-100

In Propia Persona

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. DARNELL GARCIA, et al., Defendants.	CASE NO. CR 88 983(C) TJH DECLARATION OF MARK A. BORENSTEIN IN SUPPORT OF MOTION UNDER 28 U.S.C. § 2255

I, Mark A. Borenstein, declare as follows:

I. I am an attorney admitted to practice in the State of California and a member of the bar of the United States District Court for the Central District of California. During the trial of Darnell Garcia, I served as co-counsel, along with Mark E. Overland. In addition, I continue to represent Mr. Garcia and Mrs. Garcia in connection with forfeiture proceedings now pending before the Ninth Circuit Court of Appeals. If called to testify in this matter, I could and would competently testify to the following facts of my own knowledge unless otherwise indicated.

1. At a meeting with prosecutors Joyce Karlin and Stefan Stein in October 1990 at Mr. Overland's office in Santa Monica, we had an extended discussion concerning

"Al Sevier." Mr. Overland and I had never heard the name "Al Sevier" in connection with our preparation for the case and we were keenly interested in who he was and what role the prosecutors believe he played in the subject matter of the Amended Third Superseding Indictment. I asked Mr. Stein about Mr. Sevier and Mr. Stein indicated he did not know who he was and he believed Mr. Sevier was dead. Mr. Overland and I received from the prosecutors, and through our own subpoena, telephone records concerning an "Al Sevier" and we performed considerable work in analyzing those records to determine whether any of the co-defendants had made significant numbers of phone calls to the Sevier residence. In fact, Mr. Garcia's co-defendant and former DEA agent, John Jackson, frequently called the Sevier residence. At trial we learned that the reason he called so often was that the mother of Sevier's girlfriend, who apparently lived at the address, was Mr. Jackson's mistress.

2. We devoted considerable resources in trying to find Mr. Sevier, or, at least, acquire information about him. We retained, with the Court's permission, an investigator who staked out the residence to which the telephone number was assigned in an effort to find Mr. Sevier. The investigator also attempted to conduct interviews in and around the residence to find out more about Mr. Sevier. The investigator never found Mr. Sevier at home and none of the efforts to collect additional information about him were successful.

3. The trial concluded without Mr. Sevier ever testifying, and, more importantly, without the prosecutors providing any additional discovery concerning Mr.

Sevier, other than phone records concerning the residence. At no time did the prosecutors tell the defendants that Mr. Sevier's real name was Al D. Towner and that during the trial of Mr. Garcia, they were preparing a grand jury indictment against Mr. Towner. The indictment was actually returned by the grand jury about two weeks before the evidence in Mr. Garcia's trial concluded, but there was no disclosure about the indictment or about Mr. Sevier's real name by the prosecutors. Attached hereto as Exhibit A is a true and correct copy of the March 14, 1991 indictment of Mr. Sevier.

4. I did not learn about Mr. Towner's indictment or the plea agreement reached between Mr. Stein, one of Mr. Garcia's prosecutors, and Mr. Towner until 1995, when I discovered, from a review of court files in connection with Mr. Garcia's Rule 35 Motion, the Towner indictment. That search disclosed, among other things, that Mr. Stein and Mr. Towner entered into a plea agreement whereby Mr. Towner for his crimes would plead guilty to one count of the indictment and agree to a six-year prison term. Mr. Towner was released to a halfway house earlier this year and will be released on parole after serving just four years. In subsequent Rule 35 proceedings concerning Mr. Towner, the prosecutor, Mr. Stein, characterized the punishment for Mr. Towner's crimes as "lenient."

5. Indeed, the punishment seemed to be extraordinarily lenient. Throughout the trial of Mr. Garcia, his co-defendants, who entered into plea agreements with the prosecutors, testified at length about Mr. Towner's (a.k.a. Sevier) narcotics network in Los Angeles and the large amounts of cocaine which Mr. Towner bought and sold. Both co-defendants Jackson and Wayne Countryman,

another DEA agent who entered into a plea agreement with the prosecutors, testified about a number of contacts Mr. Garcia had with Sevier/Towner and a number of drug transactions which Mr. Garcia allegedly negotiated with Sevier/Towner. When Mr. Garcia testified in his own defense, he denied ever talking with Al Sevier, meeting him, knowing him or engaging in any drug transactions with him.

6. Mr. Towner is currently in residence in a halfway house in Los Angeles nearing the completion of the confinement portion of his prison term. I am informed that when he was arrested in October 1993, Mr. Towner told the arresting officer essentially what Mr. Garcia testified to at trial. Mr. Towner said he did not know Darnell Garcia, had not, to his knowledge, ever talked to him, and had never engaged in any drug transactions with him. In addition, Mr. Towner was unable to pick out a photograph of Mr. Garcia from a photographic lineup.

7. I interviewed both Conway Waddy and Ron Waddy after the Rule 35 proceedings ended. I have been told that prior to the start of Darnell Garcia's trial in November 1990, both Conway Waddy and Ron Waddy were visited by one of the prosecutors, Joyce Karlin, and at least one and possibly two, DEA agents. At the time, both brothers were serving sentences at a federal prison in Michigan. Shortly after the interview with Ron Waddy, he was transferred to a federal prison in Tennessee. I was informed that at the interview with Ron Waddy, Ms. Karlin told him that it would not be wise for him to show up as a witness in Darnell's trial. She also indicated that if Mr. Waddy did testify at the trial, he might be indicted. That threat and the warning about not testifying was

enough to persuade Mr. Waddy not to permit an interview with Mr. Garcia's attorneys. One of them, Mark Overland, travelled to Tennessee, where Mr. Waddy was imprisoned, to conduct an interview. When Mr. Overland got to the prison (after having been told Mr. Waddy would see him), he was told that Mr. Waddy would not meet him. Conway Waddy told the same story. He too was visited by Ms. Karlin. Mr. Waddy was told that if he testified at the Garcia trial, he would be indicted, and as a result, Conway Waddy would not cooperate with me or Mr. Overland.

8. I am informed that the Waddys would testify that Mr. Garcia never was involved in any drug transaction with them and that any testimony by John Jackson or Wayne Countryman to the contrary, would be a lie.

9. Prior to the start of Mr. Garcia's trial, I issued subpoenas to Barbara Winders, Augusto Ticonni and Pierro Saltarelli requiring their testimony at trial and the production of documents. I learned, after repeated efforts to serve the subpoenas by investigators which I retained, that both Mr. Ticonni and Ms. Winders left Los Angeles at around the time the initial criminal complaint was filed against Mr. Garcia in November 1988. I believe that both went to Italy and I retained, for Mr. Garcia, an Italian lawyer in order to try to locate them in Italy which the Italian lawyer did. Thereafter, I requested the prosecutors to utilize the United States/Italy Mutual Assistance in Criminal Matters Treaty to compel the testimony of Ms. Winders and Mr. Ticonni either in Italy or in the United States. Article 159 of the Treaty authorizes requests to compel depositions in Italy or the transfer of deponents

from Italy to the United States in connection with criminal matters. The Treaty is not strictly limited to assistance for prosecutors, although only prosecutors can request assistance. It could have been used to compel the testimony on behalf of a defendant. The prosecutors declined to make a request under the Treaty for the testimony of Ms. Winders and Mr. Ticonni and for documents from each of them that would have been extremely helpful, in my view, in corroborating Mr. Garcia's defenses at trial.

10. I also requested the prosecutors to utilize the United States/Switzerland Treaty concerning assistance in criminal matters in order to obtain testimony from Swiss bankers and Swiss banking records for Mr. Ticonni and Mr. Saltarelli since I believed that that evidence would also have corroborated Mr. Garcia's testimony. A copy of this Treaty is attached hereto as Exhibit D. The prosecutors refused and I went to Switzerland to attempt to obtain the information myself. I interviewed the banker from Swiss Bank Corporation who handled Mr. Garcia's Swiss bank account and who Mr. Garcia believed was the primary banker responsible for the banking relationship with Mr. Saltarelli and Mr. Ticonni. The banker's name was Eugenio Michelli and I met with him once with a lawyer from Swiss Bank Corporation and then later alone. Mr. Michelli indicated he would like to help, but that he was precluded from doing so and he could not confirm or deny any information that I had concerning the Ticonni and Saltarelli bank accounts. I had copies of bank statements which I believed were from the bank account of Mr. Saltarelli and Mr. Ticonni, but Mr. Michelli said he was not willing to comment at all on the bank records. A sample of the unknown account statement is

attached hereto as Exhibit E. Mr. Garcia testified at trial it was a bank statement from the account of either Mr. Saltarelli or Mr. Ticonni.

11. In addition to utilizing the Italian Treaty to obtain information and documents from the three witnesses, I also asked the prosecutors to utilize the Treaty to obtain records from the Italian freight forwarder named SIMAT and from three of the jewelry manufacturers from which Mr. Saltarelli and Mr. Ticonni purchased gold jewelry. The records, I believe, would have eventually demonstrated the siphoning off of large amounts of money to Swiss bank accounts, which I believe resulted from invoices which reflected 14 karat gold when, in fact, the gold being purchased was only 10 karat gold. I personally visited the offices of each of the three gold manufacturers and the offices of SIMAT. I was accompanied by an Italian translator, but all four offices were completely uncooperative. I was unable to obtain any information from managers at the four offices. Each told me that unless they were compelled to do so by an Italian magistrate, they would not provide me with any information whatever. Attached hereto as Exhibit C is a copy of an import form showing the legal importation of gold.

12. Interestingly, though, I had a letter that I wanted Mr. Saltarelli to receive and Mr. Michelli agreed to take the letter and give it to Mr. Saltarelli when he came to the bank. I understood that conduct to mean that Mr. Saltarelli came to the bank and that Mr. Michelli was in a position to see that the letter was received by Mr. Saltarelli. Without the assistance of the Treaty with Switzerland, I was unable to obtain any other information about the banking relationships with Saltarelli and Ticonni or,

for that matter, any other information concerning Mr. Saltarelli and Mr. Ticonni.

13. I believe that documents that would have supported Mr. Garcia's defense existed at the four locations. When DEA agents went to each of the locations in 1989, they recovered some documents tending to support Mr. Garcia's defense. Mr. Michelli would not confirm the owners of the accounts such as Exhibit E, but I believe that they were deposited into either Mr. Saltarelli's account or Mr. Ticonni's account. There were undoubtedly (and may still be) substantial numbers of additional SIMAT records that show that Mr. Garcia left Italy with large quantities of gold which were never reported when he entered the United States at Los Angeles International Airport. These records would corroborate his defense that the money which was deposited into his Swiss bank account resulted from the smuggling operation of Saltarelli and Ticonni, not any drug transaction with John Jackson or Wayne Countryman.

14. Attached hereto as Exhibit F is a copy of the motion I filed on Mr. Garcia's behalf, challenging the consideration, by the Grand Jury, of banking records from Switzerland, which were obtained under the Mutual Assistance Treaty between the United States and Switzerland.

15. Attached hereto as Exhibit G is a copy of the grand jury indictment against Roberta Rasp.

16. Attached hereto as Exhibit B is a transcript of a tape of Barbara Jackson.

Executed this 23rd day of April, 1997, at Los Angeles, California. I declare under penalty of perjury under the laws of the United States the foregoing is true and correct.

Mark A. Borenstein

DECLARATION OF MARK E. OVERLAND

I, the undersigned, declare as follows:

1. I was one of the attorneys representing Darnell Garcia in *United States v. Darnell Garcia, et al., No. 88-983(C)-TJH* (hereafter *"Garcia"*) in the United States District Court of the Central District of California.

2. On or about April 9, 1991, while the jury was deliberating in the *Garcia* matter I received a phone call in my office from deputy clerk Florence Kato, clerk to the Honorable Terry J. Hatter, Jr. She informed me that Judge Hatter wanted to excuse the jury for about one week until he returned from Hawaii and asked if it would be alright with me. I told her that I objected to the jurors being excused for that length of time in their deliberations. She said that she would relate may objection to Judge Hatter. Later that day, Ms. Kato called me again and stated that Judge Hatter had excused the jurors. I asked if she had informed him of my objection and she stated she had.

3. I have reviewed the transcript of the *Garcia* proceedings on April 15, 1991 at 2:00 p.m. Ms. Kato may have stated to me on the phone that one of the jurors was having problems with her leg. Nothing else was said to me regarding any medical or health problems of any other jurors. At the time, I recall that one alternate was available.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of March, 1993 at Santa Monica, California.

/s/ Mark E. Overland
MARK E. OVERLAND

28 U.S.C § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings

brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority.

Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.